Supreme Court, U.S.
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No. 90-1352

In the Supreme Court of the United States

OCTOBER TERM, 1990

MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS (MABA), *et al.*,
APPELLANTS,

v.

THE STATE OF TEXAS, *et al.*,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

MOTION OF APPELLEES TEXAS DISTRICT JUDGES FAITH JOHNSON, BRAD UNDERWOOD, AND ROBERT CHESHIRE TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether the three-judge court correctly determined that the specific pieces of correspondence below did not constitute a material new submission under 28 C.F.R. § 51.39 and thus that the new judicial positions were precleared by operation of law?

2. Whether appellants failed to carry their evidentiary burden of showing that the particular electoral changes below were covered by section 5 of the Voting Rights Act under the facts of this case?

PARTIES

The parties named in Plaintiff's-Appellant's Jurisdictional Statement are correct except for the Defendant Intervenors. They should read as follows:

Defendant Intervenors: Faith Johnson, Brad Underwood, Robert Cheshire, Jerry Dellana, Paul R. Davis, Pete Perez and William E. Burdock.

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Pursuant to Rule 18.6, Appellees Dallas County District Judge Faith Johnson ("Judge Johnson"), Lubbock County District Judge Brad Underwood ("Judge Underwood"), and Victoria County District Judge Robert Cheshire ("Judge Cheshire") (collectively, "Texas District Judges") move this Court to dismiss the appeal filed on behalf of MABA, *et al.*, or in the alternative to affirm that this Court has jurisdiction over this appeal and summarily affirm the decision of the court below. Texas District Judges urge this result because the decision below is so obviously correct as to

warrant no further review, and because this appeal, involving strictly a review of the factual determination of the court below, does not warrant an investment of this Court's time for oral arguments.

STATEMENT OF THE CASE

To the Statement of the Case of the appellants, the Texas District Judges add the following:

The Governor of Texas appointed Judge Johnson to preside over the 363rd Judicial District Court, Dallas County, Texas, on December 12, 1989. She took the oath of office on December 14, 1989, and has presided over the 363rd Judicial District Court, which is a criminal-preference court, since that time. She stood for election to this post on November 6, 1990, and was elected by the people of Texas to serve on the 363rd court.

Judge Underwood was appointed by the Governor of Texas to preside over the 364th Judicial District Court, Lubbock County, Texas, on October 4, 1989. He has presided over the 364th Judicial District Court since he was sworn in on October 16, 1989. Judge Underwood stood for election to this post on November 6, 1990, and was elected by the people of Texas.

Judge Cheshire was sworn in as the presiding judge in the 377th Judicial District Court, Victoria County, Texas, on October 18, 1989. He was appointed to this post by the Governor of Texas on October 3, 1989. Judge Cheshire was elected by the people of Texas to continue to hold this bench on November 6, 1990.

All three of the Texas District Judges hold seats that were created by S.B. 1379. The three-judge court held that S.B. 1379 had been precleared by operation of law.

ARGUMENT

I. THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

This case does not merit plenary consideration by this Court. The three-judge district court resolved the case based on its assessment of the particular facts here, in specific, their assessment of the timing and substance of correspondence between the State of Texas and the Department of Justice. The opinion below does not purport to articulate new legal principles and does not conflict with any other district or circuit court opinion. It simply applies well-established law to the facts of this case.

The United States urged that the case presents a substantial question — whether the Attorney General's determinations of materiality of submissions under section 5 are reviewable. Brief for the United States at 10. However, the United States acknowledges that it did not argue that point below, *id.* at 9-10, it has dismissed its appeal, and the private appellants do not even raise that point.[1] Thus, the only issue before the Court is a fact-specific analysis of correspondence

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[1]The Texas District Judges think such a decision is plainly reviewable since the three-judge court can and must determine whether preclearance was granted. Because the question is not presented to the Court, the Texas District Judges will not belabor the point.

— that certainly can be reviewed by the Court without the aid of oral argument — that will set no precedent and likely will never arise again. Accordingly, plenary consideration is not warranted.

II. THE DISTRICT COURT CORRECTLY HELD THAT CORRESPONDENCE BETWEEN THE DEPARTMENT OF JUSTICE AND THE STATE OF TEXAS DID NOT CONSTITUTE MATERIALLY SUPPLEMENTING SUBMISSIONS

The majority opinion of the three-judge district court correctly held that the judgeships created by S.B. 1379 were precleared by operation of law when the sixty-day preclearance period elapsed without either (1) the interposition of an objection by the Attorney General or (2) the submission of "materially supplementing" information. *See* Memorandum Opinion and Order, Appellants' Jurisdictional Statement at 8a. It is undisputed that the State of Texas submitted S.B. 1379 for preclearance on February 13, 1990 . As a result, the sixty-day period elapsed, and S.B. 1379 was precleared by operation of law on April 16, 1990. 28 C.F.R. § 51.1(a)(2)(1990).

At issue are two pieces of correspondence that the State of Texas sent to the Department of Justice ("DOJ"). The first letter contained a copy of a portion of Texas' constitution; the second referenced a case pending in the Fifth Circuit in which the DOJ had participated. The plaintiffs claim that this correspondence extended the sixty-day period. Such correspondence was neither material nor supplementing so as to extend the DOJ's deadline for preclearance under 28 C.F.R. § 51.39(a) beyond April 16, 1990.

As the three-judge court pointed out, the standard for judging whether facts are material is whether they "might affect the outcome . . . under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court reasoned that the sections of the Texas constitution supplied at the DOJ's request by telecopy on March 23, 1990 were not "material" under the *Anderson* definition.[2] To hold otherwise would render the sixty-day period, which serves as a protection from potential DOJ abuses, meaningless.[3]

Even if the telecopy of the sections of the Texas constitution on March 23, 1990, was a material, supplementing submission so as to extend the deadline for preclearance pursuant to 28 C.F.R. § 51.39(a), the extended period expired on May 22, 1990. As the three-judge court reasoned, the letter from the state of Texas dated May 16, 1990, advising the DOJ of the pendency of the *en banc* decision in the *LULAC* case — a case in which the DOJ was actively participating as an amicus — was not a material, supplementing submission. *See* Memorandum Opinion and Order, Appellants' Jurisdictional Statement at 11-12a. This letter obviously did not affect the

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[2]Nor, for the same reasons, did these sections of the Texas constitution supplement the submission of S.B. 1379. Further, the DOJ did not request the sections of the Texas constitution properly in writing as required by the regulations under the Voting Rights Act at 28 C.F.R. § 51.37(a). *See* Memorandum Opinion and Order, Appellants' Jurisdictional Statement at 10-11a.

[3]Unchecked by judicial standards, conceivably, the DOJ would argue that requesting copies of pages from a dictionary would extend its deadline.

outcome of the DOJ's consideration of Texas' submission, as required by the *Anderson* definition of material.[4]

Thus, the time period for preclearance of S.B. 1379 expired at the latest on May 22, 1990. Because the Attorney General made no objection to S.B. 1379 until November 5, 1990, the bill had been precleared by operation of law.

III. NEITHER THE GOVERNMENT NOR THE PRIVATE PLAINTIFFS MET THEIR REQUIRED BURDEN OF PROOF

This case should be summarily affirmed for the additional reason that plaintiffs wholly failed to introduce any evidence on a required element of their claim: whether section 5 applies to the change in question. In a three-judge action to enjoin enforcement of an allegedly unprecleared change, the court addresses three questions: (1) does section 5 cover the change; (2) has the Attorney General precleared the change; and (3) what relief is appropriate. *McCain v. Lybrand*, 465 U.S. 236, 250 n.17 (1984). Appellants have simply assumed that section 5 applied and failed to introduce any of the evidence needed to assess that issue under these facts. Absent

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[4]The Attorney General's actions make clear that the pendency of *LULAC* was not material. When he made his tardy objection to S.B. 1379, he refused to follow it. In the face of the *en banc* panel of the Fifth Circuit declaring that Texas' system did not violate section 2, he declared that it did, and based his refusal to preclear on such claimed violation. Moreover, advising the DOJ of the decision could hardly be called a supplement, because the DOJ was involved in the *LULAC* litigation and must have been aware of the pending *en banc* decision. Again, would the DOJ be allowed to argue an extension of time if a political subdivision wrote and requested it to be aware of its duties under section 5?

any proof on an element of appellants' cause of action, judgment was properly entered against them.

The appellants argued that the addition of the three seats held by the Texas District Judges are covered by section 5 pursuant to this Court's summary affirmance of *Brooks v. State Board of Elections*, No. CV-288-146 (S.D. Ga. Dec. 1, 1989), *aff'd*, 111 S.Ct. 288 (1990). *Brooks*, however, must be limited to its particular facts because it only was summarily affirmed. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977); *Fusari v. Steinberg*, 419 U.S. 379, 388-89 n.15 (1975). *Brooks* did *not* broadly hold that all electoral changes relating to judges were covered by section 5; to the contrary, *Brooks* used a fact-specific analysis to determine whether the addition of judges to an existing, valid system is covered by section 5.

Brooks correctly cites *Dougherty County, Georgia, Board of Education v. White*, 439 U.S. 32 (1978), as authority for determining whether a proposed change in voting practices falls within section 5's coverage. The standard is whether the change "has a potential for discrimination." *Id.* at 42. The *Brooks* court very carefully set out the proper analysis for when the additional of an additional seat to an at-large system would have such potential:

> Where only one judge is to be elected in a circuit, anti-single-short provisions can have no potential for discrimination. If another judicial post is added, however, such provisions may well be thwarting what would otherwise be an opportunity to conduct a successful single-shot voting campaign. Adding a post to a multi-judge circuit could have the same effect. Depending upon the percentage of minority voters and the cohesiveness of their voting, and a successful

> single-shot voting campaign may be highly improbable until there are three or more available posts in the circuit. If a single-shot campaign, although unavailing when only two posts are available, would be successful in a three-post race, then the addition of that third post alters the effect of the anti-single-shot provisions in that district.

Brooks, slip op. at 7.

In accordance with this instruction, a three-judge court cannot simply assume that section 5 applies to the three benches upon which the Texas District Judges sit. The addition of a bench in Dallas, Lubbock, and Victoria counties must be examined on a county by county basis. *Before section 5 is implicated, there must be evidence that the addition of the bench itself is what triggers the potential for discrimination.*[5]

Judge Johnson's bench is the 37th in Dallas County; Judge Underwood's is the sixth in Lubbock County; and Judge Cheshire's is the fourth in Victoria County. Appellants would have to prove that the incremental increase in benches — rather than the existing system — has the potential for discriminatory effects. Given the *LULAC* decision, the validity of the existing system is clear.[6] *League of United*

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[5]The court in *Brooks* demonstrated how the addition of seats to an existing judicial district may actually improve the chances of a minority voting group to elect their chosen candidate. *Brooks*, slip op. at 7 n. 15.

[6]As the majority opinion in the three-judge court noted, the holding of the Fifth Circuit in *LULAC*, absent further ruling from the this Court, establishes that section 2 does not apply to the election of judges in the Fifth Circuit. Yet, despite this plain ruling, the Attorney General based his letter of objection in this case on the ground that the at-large election of judges in Texas violates section 2. As the court below notes, "[t]his position reflects a disturbing disregard for the rule of law" on the part of

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Latin American Citizens Council No. 4434 v. Clements, 914 F.2d 620 (5th Cir. 1990) (*en banc*), *cert. granted*, 111 S. Ct. 775 (1991). Appellants could not show that, for example, the addition of a 37th at-large bench in Dallas increases in any way any form of discriminatory effect not already extant in the prior 36 at-large benches in Dallas County. Absent such a showing — in which the appellants would bear the burden of proof — appellants cannot show the applicability of section 5. Because appellants failed to offer such proof below, judgment was properly entered against them.[7]

CONCLUSION

For the foregoing reasons, the appeal docketed by MABA, *et al.* should be dismissed, or in the alternative, this Court should affirm that it has jurisdiction over this appeal and summarily affirm the decision of the court below.

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the Attorney General. *See* Memorandum Opinion and Order, Appellants' Jurisdictional Statement at 13-14a.

[7]Following the clear precedent of the *LULAC* decision, another three-judge panel within the Fifth Circuit has recently held that section 5 does not apply to the addition of new at-large judges to an existing judicial structure within set geographical boundaries. *Hunter v. City of Monroe*, 757 F. Supp. 25 (W.D. La. 1990), *petition for cert. filed*, 59 U.S.L.W. 3527 (U.S. Jan. 23, 1991)(No. 90-1187). It is possible that the Court's consideration of this appeal may be simplified by its decision in *Clark v. Roemer*, 751 F.Supp. 586, 5922 (W.D. La. 1990), *probable juris. noted*, 111 S. Ct. 775 (1991) (preclearance of statute creating ultimate number of judicial seats constitutes preclearance of all judicial seats necessary to reach that ultimate number).

Respectfully submitted,

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